REPLY ARGUMENT

1. The proposed Statement of the Facts submitted by the appellees lacks reference to any page in the Record. Rule 6(b) of the Court of Appeals Rules indicates that

> (b) No complaint of or reliance upon action by the trial court will be considered on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. **No assertion of fact will be considered** on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded.

[bold added]. Trusting in the above rule, the appellant, Bobby MacBryan Green ("Green") will not belabor the issue other than to assert that much of appellees' Statement of the Facts is based neither upon the Record nor the truth.

2. Green asserts that the proposed Statement of the Case submitted by the appellees is less accurate and therefore inferior to Green's Statement of the Case. Green notes that the appellees have confirmed that the Chancellor considered both the *Answer* and affidavits of the appellees.

3. Green objects to the continuing vague, mysterious references made by the appellees to "certain stipulations." If Green's attorney made any stipulation (which Mr. Jessee avers he did not), Green is entitled to be fully informed concerning the details of such a stipulation. There would be no justice in permitting the appellees to benefit from an asserted stipulation which remains cloaked in absolute mystery.

4. Green deduces that in the first paragraph of their Argument on page 4 of their brief, the appellees intend to impugn his reliability. However, Rule 65, Tennessee Rules of Civil Procedure makes a definite distinction between a temporary injunction and a restraining order.

> RULE 65.01: INJUNCTIVE RELIEF.
> Injunctive relief may be obtained by (1) restraining order, (2) temporary injunction, or (3) permanent injunction in a final judgment. A restraining order shall only restrict the doing of an act. An injunction may restrict or mandatorily direct the doing of an act.

~ *Plaintiff's Amended Motion for Restraining Order* was denied on 27 June 2011; *Plaintiff's Motion for Temporary Injunction* apparently was never presented to any judge. ~ These two statements do not conflict. The appellees err by suggesting otherwise.

5. The appellees properly raise only one counterpoint to the *Brief of Appellant*. The appellees assert that the outcome of this civil action is controlled by the sentence : "If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein." (Rule 52.01, TN.R.Civ.P.). In their Argument the appellees have included without citation to the Record a lengthy statement which they label "The Court's Opinion." Rule 6(b) of the Court of Appeals Rules indicates that

> (b) **No** complaint of or **reliance upon action by the trial court** will be considered on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded.

[bold added]. Green relies upon the above rule, yet realizing that the Court may suspend the rule, he asserts that the Record demonstrates that the 'Court's Opinion' set forth in the appellee's brief was definitely **not** filed prior to the transfer of jurisdiction over this civil action to the Court of Appeals.

6. 'The Court's Opinion' as set forth in the page-and-a-half Argument of the appellees appears to consist of excerpts from the *Transcript of Proceedings / Hearing of November 2, 2011* being Volume II of the Record. The appellees have made no attempt to indicate that they have deleted sentences from the midst of that lengthy statement. They have also omitted

the preamble in which the Chancellor demonstrably misstated the elemental facts set forth by Green's verified pleadings. Nor does the 'Court's Opinion' provide any elucidation of the mysterious stipulation to which the appellees cling.

7. Green understands the appellees to now insist that the appearance of the 'Court's Opinion' in the appellate Record eliminates all grounds for appellate relief. The Catch 22 circularity of that argument is patent. E.g., the *Final Decree* was unsupported making it subject to being vacated upon appeal, except that Green has appealed and has filed a Transcript for appeal which contains the 'Court's Opinion' making the appeal unsupported instead; but if there had been no Transcript filed for appeal, the *Final Decree* would have remained unsupported and subject to being vacated. In any case, the 'Court's Opinion' by no means presents sufficient findings of fact to meet the intent of Rule 52, TN.R.Civ.P.

8. Moreover, the 'Court's Opinion' as set forth in the appellee's brief contains a statement which can be proven to seriously undermine any possible value : "The Answer says that ... yes, in fact, they had removed him as a member ...." Yet the first mention of any purported revocation of Green's SNO membership is to be found in documents filed on 20 October 2011, over two months after entry of the *Final Decree*; paragraphs 7-8 (R120-121) of the *Supplemental Affidavit of Bobby MacBryan Green*, being Exhibit W to Green's motion for a Supplemental Complaint, set forth in the *Notice of Hearing* (R118) state :

> 7. On 27 September 2011, I received by U.S. Mail a letter in an envelope bearing Polaha's return address and postmarked 26 September 2011 PM. That letter bears the signatures of eight individuals and without citing any authority purports to expel me from membership in SNO. A copy of that letter is attached hereto as *Exhibit T*. A SNO check signed by Treasurer Jondahl was enclosed with the letter. I am aware of no precedent for such a letter of expulsion.
>
> 8. I am unaware of any legitimate proceedings against my right to SNO membership. I was totally surprised by the content of the letter which I received from Polaha on 27 September 2011, being

> the day following delivery of my member-request for documentation to Secretary Polaha, who is the mother of Defendant Jodi Jones, who is next door neighbor to Defendant Mary Lee Jondahl.

Furthermore, the statement in the 'Court's Opinion' that "the Southside Neighborhood Association did not want Mr. Green as its President and it did not want him as a member" is unsupported by any evidence whatsoever. Please see *Brief of Appellant* pages 19-22 for elaboration. Southside Neighborhood Organization by a commanding margin elected Green as its president and has taken no further action on the subject. Undoubtedly, the appellees do not want Green as president or member, but the appellees are not Southside Neighborhood Organization. They have wrongfully acted in concert to irreparably damage both Green and the Organization, and to seriously misguide the trial court.

9. Assuming only for the purpose of argument that on 6 December 2011 the trial court had filed an opinion or memorandum of decision relating to the *Final Decree* and containing the same statements found in the 'Court's Opinion,' such a filing could have no effect on this appeal. The Final Decree was filed on 9 August 2011, four months earlier. While Rule 52, TN.R.Civ.P. provides no specific time frame for filing findings of fact and conclusions of law, that rule appears to anticipate that findings of fact be set forth either as an integral part of the final judgment or at least within a short period of time thereafter, while matters remain fresh in the mind of the trial court. The passage of four months precludes such freshness and in the absence of a transcript or relevant filed documents the contents of such a belated memorandum decision would of necessity be based upon the independent recollection of the Chancellor, after hundreds of intervening hearings. Decisions regarding *nunc pro tunc* judgments address similar concerns. Summarized colloquially, those decisions wrestle with the tension between the maxim "Better late than never" and the equally valid maxims "A day late and a dollar short" or "Delayed obedience is disobedience."

> HN9 Nunc pro tunc is a Latin term which means "now for then." The term is applied to acts permitted to be done after the time when they should been done, and carrying an effect retroactive to the date when they should have been done. See Black's Law Dictionary (Fifth Ed. 1979). In situations where a judgment was pronounced but not entered, it may later be entered nunc pro tunc as of the date of its pronouncement, provided the requisite facts appear of record to justify its entry. Thomas v. State, 206 Tenn. 633, 337 S.W.2d 1, 4 (Tenn. 1960).

Lois Spence v. Robert Helton, No. M2005-02527-COA-R3-CV (Tenn. Ct. App. Apr. 23, 2007); 2007 Tenn. App. LEXIS 244, @18. Those requisite facts of record which may justify entry are enumerated in Thomas v. State:

> Such an extension order, however, if actually made and filed in time, may later be validly entered on the minutes under the rule for entry of nunc pro tunc judgments and decrees. That rule is that where a judgment is pronounced but not entered, it may be later entered nunc pro tunc, as of the date of its pronouncement, provided the requisite facts appear of record to justify its entry. Chattanooga Dayton Bus Line v. Burney, 160 Tenn. 294, 23 S.W.2d 669; Gillespie v. Martin, 172 Tenn. 28, 109 S.W.2d 93.
>
> HN3 In its requirement as to such facts, this rule is somewhat similar to the statute (T.C.A. sec. 20-1512) for correcting mistakes or omissions in judgments. Gillespie v. Martin, supra. **Such facts cannot rest on the trial judge's "independent recollection"** (Braden v. Clark, 203 Tenn. 265, 310 S.W.2d 462, 465), but must appear of record. In Gillespie v. Martin, supra [172 Tenn. 28, 109 S.W. 94], [***7] it was said: "The general rule is that to justify a nunc pro tunc order there must exist some memorandum or notation found among the papers or books of the presiding judge, and a nunc pro tunc order will not be valid unless there is some such memorandum showing what judgment or order was actually made and these jurisdictional facts recited. Rush v. Rush, 97 Tenn. 279, 283, 37 S.W. 13."

Roscoe Thomas v. State of Tennessee, [bold added] 206 Tenn. 633, 639 (Tenn. 1960); 337 S.W.2d 1, 4; 1960 Tenn. LEXIS 411 @ 6-7. Volume II of the technical record, the Transcript, was not created until several months after the *Final Decree* was entered and therefore cannot supply the requisite “memorandum or notation” to justify *nunc pro tunc* entry of findings of fact

and conclusions of law to support the *Final Decree*. The 'Court's Opinion' was neither incorporated into the 4 November 2011 *Order* denying Green's *Motion to Alter or Amend*, nor identified as a supplement to the *Final Decree*. The 'Court's Opinion' not only fails to recite the jurisdictional facts necessary for *nunc pro tunc* entry but also suggests either unfamiliarity with, or faulty independent recollection of, the specific facts abundantly set forth in the Record. The appellees' claim regarding the status of the 'Court's Opinion' represents merely another effort to obfuscate the true issues and posture of this civil action.

10. The trial court has entered no findings of fact which could possibly allow the parties to resolve this matter in their minds. The Statement of Facts found in the *Brief of Appellant* addresses the specific facts which the trial court should have found. At this point, the question revolves around the appropriate action to be taken by the Court of Appeals. Recent cases resolve that question:

> III. STANDARD OF REVIEW
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> HN1 On appeal, we review the decision of a trial court sitting without a jury de novo upon the record, accompanied by a presumption of correctness of the trial court's findings of fact, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); Bogan v. Bogan, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a de novo review with no presumption of correctness. Blackburn v. Blackburn, 270 S.W.3d 42, 47 (Tenn. 2008); Union Carbide Corp. v. Huddleston, 854 S.W.2d 87, 91 (Tenn. 1993). Mixed questions of law and fact are reviewed de novo with no presumption of correctness; however, appellate courts have "great latitude to determine whether findings as to mixed questions of fact and law made by the trial court are sustained by [*16] probative evidence on appeal." Aaron v. Aaron, 909 S.W.2d 408, 410 (Tenn. 1995).
> .....
>
> [*21] However, HN5 "[w]hen the trial court makes no specific findings of fact . . . we must review the record to determine where the preponderance of the evidence lies." Kendrick, 90 S.W.3d at 570 (citing Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn 1997)).

Elizabeth Finch v. Timothy Hayes, 2011 Tenn. App. LEXIS 566, 15-16 (Tenn. Ct. App. Oct. 20, 2011) No. E2010-00750-COA-R3-CV. Furthermore,

> The City insists that the trial court's failure to make a specific finding as to whether the swing was in a dangerous or defective condition [*7] is fatal to the plaintiff's claim. However, HN3 "if the trial judge has not made a specific finding of fact on a particular matter, we review the record to determine where the preponderance of the evidence lies without employing a presumption of correctness." Rawlings v. John Hancock Mut. Life Ins. Co., 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). Therefore, we must examine the evidence to determine whether the swing was in a dangerous or defective condition.

Wright v. City of Lebanon, 2011 Tenn. App. LEXIS 99, 6-7 (Tenn. Ct. App. Mar. 1, 2011) No. M2010-00207-COA-R3-CV. If the Court determines that the posture of the case permits, Green requests that the Court enter as findings of fact all the specific details set forth in his Statement of Facts found in the *Brief of Appellant* in accordance with Tennessee Code Annotated ¶27-1-113:

> Findings of fact Scope of review.
> In all cases tried on the facts in a chancery court and afterwards brought for review to the court of appeals, the court of appeals shall, to the extent that the facts are not stipulated or are not concluded by the findings of the jury, make and file written findings of fact, which thereupon shall become a part of the record. ...

11. Although probably unnecessary, Green will here belabor the issue of the mysterious, formless stipulation. Assuming only for purposes of argument that Green had not explicitly and repeatedly withheld stipulation authority from Mr. Jessee, and assuming only for the purposes of argument that Mr. Jessee has misinformed Green on the subject, it is nevertheless clear that no legitimate stipulation could have resulted in entry of the *Final Decree.* Although stipulations of fact are binding, under no circumstances could Mr. Jessee be assumed to have authority to deviate from Green's extensive sworn statements contained in the record. Although procedural stipulations are usually binding, under no circumstances

could Mr. Jessee be assumed to have authority to disavow Green's explicitly delineated prayers for relief set forth in the record without first conferring with Green. If Mr. Jesse made any stipulation of law, although there is no indication that he did, the Court of Appeals is not bound by such.

> HN4 "A stipulation of law is not binding upon an appellate court." Avila v. Immigration & Naturalization Serv., 731 F.2d 616, 620 (9th Cir. 1984). When a stipulation may affect a number of cases beyond the one under consideration, the court has a duty to make an independent resolution of such issue. Strauss v. United States, 516 F.2d 980, 982 (7th Cir. 1975).

Clyde Brown, Jr. V. United States of America, 868 F.2d 859, 864 (US Court of Appeals for the 6th Circuit, KY 1989); 1989 U.S. App. LEXIS 2211 @16. Similar holdings have been published by other federal circuit courts :

> The law is clear that stipulations of law are not binding on the court. Sanford's Estate v. Comm'r. of IRS, 308 U.S. 39, 51 (1939); Harbor Ins. Co. v. Essman, 918 F.2d 734, 738 (8th Cir. 1990); Minneapolis Brewing Co. v. E. B. Merritt, 143 F. Supp. 146, 149 (D.N.D. 1956). However, stipulations by the parties regarding questions of fact are conclusive. Burstein v. United States, 232 F.2d 19, 23 (8th Cir. 1956).

Gander v. Livoti [6], 250 F.3d 606, 609 (8th Cir. 2001)

> ("Litigation stipulations can be understood as the analogue of terms binding parties to a contract. As in contract law though, rules limiting litigants to trial stipulations are not absolute. Case law is clear that a stipulation of counsel originally designed to expedite the trial should not be rigidly adhered to when it becomes apparent that it may inflict a manifest injustice upon one of the contracting parties. Parties will usually be relieved of their stipulations where it becomes evident that the agreement was made under a clear mistake.") (citations and quotation marks omitted)

TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995). Had Mr. Jessee agreed that *Plaintiff's Motion for Supplemental Pleadings* and *Plaintiff's Motion for Temporary Injunction* be heard prior to the hearing of the defendants' *Motion to Dismiss* (although there is no indication that Mr. Jessee did) Green could not now reasonably protest, in that Green requested such a course of action in his *Motion to Quash* (R55, ¶8). However, under no

circumstances could Mr. Jessee have offered, or could the trial court have legitimately accepted, any agreement which denied to Green a right so fundamental as the right to prepare for, to be present at, and to participate in the trial on the merits.

12. Lest there be any doubt or question, Green avers that Mr. Jessee's withdrawal as Green's counsel in this matter was in no way whatsoever related to Green's sworn statements or truthfulness.

CONCLUSION

13. A definite term of office which he earned in a free and fair election, not on the other side of the globe, but here in the heartland of America has been wrongfully, precipitately taken from Green. Contrary to parliamentary law and custom, contrary to Green's property right, contrary to an express reciprocal contract, contrary to the principles of good faith and fair dealing, the appellees falsely proclaimed Jodi Jones president. Instead of either correcting the collaborators or refusing to intervene, at the instigation of Mr. Sherrod the trial court disregarded both facts and law and suddenly sent Green away chastened, deposed from office, and silenced in all arenas other than the Court of Appeals to whom Green now turns for belated justice. The appellees rely upon the affidavits (R48-53) attached to their *Motion to Dismiss*; Green urges the Court to recognize that (1) although Jones/Polaha/Jondahl have chosen to so exalt themselves, the SNO Bylaws permit no "Executive Committee" and that (2) with regard to this matter the appellees have done little or nothing "properly," e.g., in accordance with the essential principles of due process.

* * * * *